No. 80-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMONWEALTH OF PUERTO RICO,
Petitioner,

v.

DONALD T. REGAN, SECRETARY
DEPARTMENT OF THE TREASURY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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April 17, 1981

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1. Respondent's lengthy brief in opposition is more important for what it does not say than for what it does. Respondent simply does not dispute the fact that this action is of exceptional importance to the United States of America, the Commonwealth of Puerto Rico, and the Virgin Islands. Nor could he in light of the representations made to the Court of Appeals in his suggestion for hearing *en banc*. *See* Petn. at 67a-72a. Instead, respondent spends twenty-four printed pages arguing that the decision below is correct. Yet, even respondent concedes

that the words of the statutory provision at issue "permit [the] reading, advanced by petitioner." Brief in Opposition ("Br. Opp.") 8. In light of that concession (and similar concessions made below) and the unquestioned national importance of the issues presented, the need for plenary review by this Court is indisputable.

2. In his brief in opposition, respondent advances numerous arguments in support of his contention that the decision below is correct. Certain of those arguments are so egregiously erroneous that a brief reply is necessary.

a. Respondent mischaracterizes petitioner's position by claiming that Puerto Rico seeks rebate of all taxes on any transaction involving articles produced in Puerto Rico and transported to the United States. Br. Opp. 8. Based on that mischaracterization, respondent attempts to conjure up a litany of horrors involving alleged administrative problems associated with petitioner's claim. *Id.* at 8-9. First, that effort demonstrates the extent to which respondent must go to avoid the facts of this case. Contrary to respondent's apparent wish, this case involves the gasoline excise tax, not a tax imposed upon the transportation of property by air. The Court need only consider the facts presented by the case before it; it need not consider theoretical cases existing only in the minds of advocates. Second, respondent's argument that, if petitioner prevails, taxes would have to be covered over to Puerto Rico whenever there is tax "on any transaction involving a Puerto Rican article", Br. Opp. 9, ignores the language of the cover over provision. That provision reaches only "taxes *collected . . . on articles* produced in Puerto Rico and transported to the United States." (Emphasis supplied.) Gift, estate, sales, or transportation taxes are not at issue here. What is at

issue is the gasoline excise tax, which clearly is imposed on the article. *See* 75 *Cong. Rec.* 11657 (1932) (remarks of Senator Walsh) ("The manufacturers' excise tax proposal [for gasoline] is to lev [sic] the tax once, *upon the article*, in its finished state. . . . ")(emphasis supplied).

b. Respondent asserts that petitioner's claim is refuted by the "complementary relationship" between 26 U.S.C. §7652(a)(3) and 26 U.S.C. §7652(a)(1). Br. Opp. 11. However, that assertion overlooks the unqualified admonition in the Internal Revenue Code that "[n]o inference, implication, or presumption of legislative construction shall be drawn or made by reason of the location or grouping of any particular section or provision or portion of this title. . . . " 26 U.S.C. §7806(b). Subsections (a)(1) and (a)(3) derive from two entirely different statutes, the Foraker Act of 1900, 31 Stat. 77, and the Jones Act of 1917, 39 Stat. 951, enacted for totally different purposes, seventeen years apart.

c. Respondent misrepresents the meaning of the legislative history when, in his effort to demonstrate that "the taxes to be covered over by this section were the Foraker Act equalization taxes," Br. Opp. 14, he uses ellipses in quoting the House Report. This is evident from the following:

The full quotation H.R. Rep. No 77, 64th Cong., 1st Sess. 1 (1916):	Respondent's revision Br. Opp. 14:
"It appears that the present rule is to pay *into the Porto Rican Treasury those taxes that are collected under the internal-revenue laws of the United States on articles produced and used in Porto Rico, and* into the Treasury of the United States internal-revenue taxes collected on articles produced in Porto Rico but transported to the United States." (Emphasis supplied for omitted portion.)	" the present rule is to pay..... .... into the Treasury of the United States internal-revenue taxes collected on articles produced in Porto Rico but transported to the United States."

Thus, the phrase "these taxes" referred not merely to equalizaton taxes imposed by the Foraker Act but also to taxes "on articles produced and used in Porto Rico," which *cannot* have been equalization taxes. The Senate amendment to the cover over provision made it diverge even more sharply from the Foraker taxing provision by including taxes on articles "produced elsewhere" (not just in the United States) but consumed in Puerto Rico. Petn. at 10.[1]

[1] Respondent's assertion, Br. Opp. 14, that there were no U.S. internal revenue taxes "relating to Puerto Rico other than the Foraker Act taxes" is irrelevant. The House and Senate reports make clear that the Congress was legislating a matter of principle — that any taxes which might *then or thereafter* be imposed on Puerto Rican articles or on articles of other manufacture consumed in Puerto Rico would be covered into the treasury of Puerto Rico.

d. *Griffin* v. *California,* 380 U.S. (1965), cited by respondent, Br. Opp. 16, is inapposite. Petitioner does not suggest that any adverse inference should be drawn from respondent's withholding, on grounds of privilege, of twenty-three concededly relevant documents. Petitioner argues that *no* inference should be drawn. The point is not whether respondent can invoke various privileges; it is that respondent should not be able to make an affirmative argument based on allegedly consistent administrative construction while withholding some such constructions for whatever reason. To allow respondent to claim a consistent course of administrative construction while withholding documents that would or may disprove that claim is akin to allowing a defendant to invoke the advice of counsel defense while, at the same time, making otherwise valid assertions of the attorney-client privilege. One cannot make affirmative use of an attorney's advice while refusing to permit inquiry into the nature of the advice. *United States* v. *Miller,* 600 F.2d 498 (5th Cir. 1979), *cert. denied,* 444 U.S. 955 (1980); *Hyde Construction Co.* v. *Koehring Co.,* 455 F.2d 337 (5th Cir. 1972); *Trans World Airlines, Inc.* v. *Hughes,* 332 F.2d 602 (2d Cir. 1964), *cert. dismissed,* 380 U.S. 248 (1965). Fairness precludes use of such advice as both a sword and a shield. The same principle of basic fairness is applicable here. Either respondent must produce all relevant documents or no inference concerning respondent's administrative construction should be drawn.

e. Respondent attempts to rebut petitioner's argument that the decision below allows certain gasoline to escape taxation by asserting that the broad definition of "producer" in 26 U.S.C. §4082(a) precludes the possibility that gasoline could go untaxed. Br. Opp. 20. The short answer is that respondent's assertion proves

too much. If firms that ship gasoline from Puerto Rico to the United States could be taxed as "producers" pursuant to section 4082(a), then so could firms that ship gasoline from any foreign country to the United States. Respondent's position thus would render the term "importer" in 26 U.S.C. §4081(a) redundant, contrary to the rule that all words in a statute should be given effect and should not be construed in a manner that would render them surplusage. *Administrator, FAA* v. *Robertson*, 422 U.S. 255, 261 (1975); *Wilderness Society* v. *Morton*, 479 F.2d 842, 856 (D.C. Cir.), *cert. denied*, 411 U.S. 917 (1973). The bankruptcy of respondent's argument is amply demonstrated by his final, wholly unsupported assertion that "importer" means one thing when used in sections 5001 and 5701 and yet another when used in section 4081(a). Br. Opp. 21-22.

f. Finally, respondent would have this Court believe that "the gasoline taxes claimed by petitioner had . . . been paid by the Secretary into the 'Highway Trust Fund,' the 'Land and Water Conservation Fund', and the 'Airport and Airway Trust Fund.' " Br. Opp. 22. That simply is not true. There is no earmarking or dedication of the gasoline tax receipts into the Highway Trust Fund or any other fund. Instead, Congress appropriated from general revenues *amounts equivalent to* stated percentages of various taxes collected under certain provisions of the Internal Revenue Code, *see, e.g.*, §209(c), Highway Revenue Act of 1956, 70 Stat. 387, 398, and even respondent has conceded below that the gasoline excise tax receipts are paid into the general fund of the United States Treasury. In short, as the District Court correctly concluded,[2] the statute "simply does not create the bar that [respondent] asserts it creates." Petn. at 55a.

[2] The Court of Appeals did not reach the issue.

CONCLUSION

For the reasons set forth above and in the petition, a writ of *certiorari* should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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April 17, 1981

Certificate Of Service

I, Michael J. Henke, attorney for petitioner and a member of the Bar of this Court, certify that on this 17th day of April, 1981, the foregoing Reply has been served upon respondent by hand-delivering three copies thereof to David English Carmack, Department of Justice, Washington, D.C., attorney for respondent and by mailing three copies, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

/s/ MICHAEL J. HENKE
Michael J. Henke